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No. 81-58

In The

# Supreme Court of the United States

October Term, 1980

LEROY BUTLER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## QUESTIONS PRESENTED

1. Where petitioner was charged with conspiring distribute heroin and the proofs showed only that he distributed non-prohibited pharmaceuticals (mannite and quinine), could his conviction be affirmed upon a theory not presented at the trial: namely, that he conspired to aid and abet heroin dealers by selling them some components necessary to their trade?

2. Was petitioner, in effect, denied a jury trial where the Court of Appeals enunciated a theory of complicity which was not charged in the indictment, not presented at the trial, not given to the jury as a basis for criminal liability, not argued on the appeal, and which emerged for the first time in the majority opinion of the Court of Appeals?

3. Where the Court of Appeals majority affirmed the convictions by making its own finding that there was a conspiracy to aid and abet heroin distribution, rather than a simple conspiracy to distribute as charged in the indictment, does such new determination at the appellate level describe any known crime? On the facts of this case, is not a "conspiracy to aid and abet" actually a "conspiracy to conspire" which, in law, fails to identify any known crime?

4. Where petitioner and his codefendants were independently involved in distributing to their own customers pharmaceuticals such as mannite and quinine, which are not regulated by the federal drug statute, did the majority in the Court of Appeals err in finding all of the defendants involved in a single criminal conspiracy under 21 U.S.C. §846?

5. Petitioner adopts and joins in all other arguments and contentions, which are not inconsistent with his position herein, made by defendants below in their petitions in this Court.

## STATEMENT PURSUANT TO RULE 21 (.1)(b) LISTING NAMES OF PARTIES BELOW

In addition to the petitioner herein, Leroy Butler, the names of the parties in the Court of Appeals for the Second Circuit are as follows: Leroy Perry, Charles Cameron, Donald Dewees, Arthur Gibbons and Willie Earl Patterson.

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No.

In The

# Supreme Court of the United States

October Term, 1980

LEROY BUTLER,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## OPINION BELOW

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered on the 9th day of February 1981 (Appendix A, *infra*, 1a: original slip opinions and subsequent corrections and changes; *see also*, advance sheet opinion, uncorrected, reported at 643 F. 2d 38).[1] Petitioner's application

1. The uncorrected advance sheet opinion set forth at 643 F. 2d 38, insofar as our arguments on this petition are concerned, does not vary materially from the final version of the opinion of the Court of Appeals.

in the Court of Appeals for a rehearing by the original panel (Oakes, Van Graafeiland, C.J.J. and Nickerson, D.J.), and for a rehearing en banc was denied on May 13, 1981 (Appendix C, 36a). The judgment of the Court of Appeals affirmed the judgment of conviction entered against the petitioner on December 21, 1979, after a jury trial in the United States District Court for the Eastern District of New York (Mishler, U.S.D.J.) wherein petitioner and five codefendants were found guilty, under 21 U.S.C. §846 of conspiracy to distribute heroin.[2]

For his part in the conspiracy, petitioner was sentenced to a term of imprisonment for fifteen (15) years, a special parole term of ten (10) years, and a fine of $25,000. Petitioner has been in custody since the date of the jury verdict herein, October 17, 1979, and he is presently serving his sentence.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved herein are the Fifth and Sixth Amendments to the United States Constitution. The statutory provisions are: 18 U.S.C. §2; 21 U.S.C. §§841; 846.

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2. The majority decision in the Court of Appeals affirmed the convictions upon the theory that the defendants, although not guilty of conspiring to distribute heroin, did conspire to aid and abet heroin dealers by supplying diluents such as mannite and quinine to them.

## STATEMENT OF THE CASE

Petitioner and six other defendants who went to trial in the instant case, were charged with conspiracy to violate the federal narcotics laws (21 U.S.C. §846) in a one count indictment unsealed on June 14, 1979, in the Eastern District of New York. The indictment charged that the defendants, during the period from July 1974 to December 1976, carried out the object of the conspiracy by distributing heroin[3] and by distributing quantities of mannite and quinine to be mixed with heroin. At the trial, the proofs did not implicate the defendants in the direct manufacture or direct sale of heroin, but did tend to show that each defendant received from a single source quantities of mannite and/or quinine which he in turn sold to his own customers for use by them as a heroin diluent. In short, the case as tried revealed that the defendants acted separately as intermediate wholesalers of unregulated and unscheduled substances which were ultimately to be incorporated by various combines and persons unknown into a heroin product suitable for sale to drug users.

At the trial, it was conceded that neither quinine nor mannite are substances whose distribution is outlawed by the federal narcotics statutes. These substances, however, are used in the drug trade to dilute illegal narcotics thereby rendering them less potent and more suitable for bodily use.

In this case, a Canadian pharmaceutical distributor caused substantial quantities of the diluents to be transported to New York City where they were sold in smaller consignments to the separate defendants. The defendants, some of whom knew each other, proceeded to merchandise the diluents to their own respective customers who, it is surmised, resold or used the

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3. This contention was abandoned at the trial.

benign powders to "cut" heroin in their own separate and distinct mills. While evidence was offered to show that petitioner and some of the other defendants had been active in the heroin trade, the case as it was finally presented to the jury premised the liability of the defendants entirely and solely on the theory that they had conspired to sell diluents with knowledge of their intended use to be mixed with heroin. In this connection, the jury was instructed that guilt did not require a finding that the defendants sold or manufactured heroin; but only that the defendants acted together to distribute diluents with an awareness of their ultimate incorporation into the outlawed heroin product.

The indictment did not charge the defendants on an aiding and abetting theory. Nor did any instructions to the jury suggest that culpability in this case was being claimed on the premise of aiding and abetting, or a conspiracy to aid and abet the distribution of heroin.

The majority decision rendered by the Court of Appeals found that the defendants, although not so charged in the indictment were, by a process of "reading in" of 18 U.S.C. §2, united in a single conspiracy to aid and abet the distribution of heroin by providing to diverse heroin dealers the mannite and quinine necessary to the compounding of their product. The dissent by Judge Oakes declined to find a single conspiracy where the substances being dealt in were not themselves outlawed, and where the diluents were being distributed to various unknown heroin "operations" which were unrelated to each other (16a-17a). Judge Oakes also declined to find a conspiracy to aid and abet heroin distribution since "[t]his was not the charge under the indictment or the instruction of the court" (16a). Judge Oakes did, however, find multiple conspiracies in which there were adequate proofs as to each conspiracy and no damaging spillover as between conspiracies except for one defendant not concerned in this petition.

## REASONS FOR GRANTING THE WRIT

### I.

**The majority decision of the Court of Appeals to sustain the conspiracy convictions by reading into the indictment an aiding and abetting charge where that concept was never raised by the government, nor tried to the jury, nor instructed upon by the trial court, nor argued by either side on the appeal, is erroneous. The affirmance on this ground impinges upon petitioner's right to a trial by jury.**

The main panel opinion joined in by Judges Van Graafeiland and Nickerson affirmed the conviction of petitioner and other defendants on the theory that they conspired to "aid and abet" the distribution of heroin by agreeing to distribute diluents knowingly into various heroin networks. As pointed out in the main decision written by Judge Oakes who, in effect, articulated the grounds of the majority while disagreeing with them, the indictment never charged the defendants with conspiring to aid or abet the distribution of heroin; the prosecution never presented that theory to the jury or to the defense, and the trial judge never once suggested to the jury in its instructions that the defendants conspired to aid and abet in the distribution of heroin (16a). Neither was the concept of aiding or abetting raised on the appeal by either side, or in the oral argument. Judge Oakes, therefore, parted company with the majority on its findings as aforesaid and chose to affirm on altogether different grounds; that is, that there were multiple *Kotteakos*-type conspiracies, but that the separate proofs did not spill over in a prejudicial way (except as to the defendant Dewees) and there was legally sufficient proof to sustain the convictions of those seen as having been involved in the two separate conspiracies which he was able to discern. While we do not agree with Judge Oakes, even as to his conclusion that the

sale of benign ingredients to various heroin dealers constituted multiple conspiracies, we address ourselves to the deficiencies in the majority view based as it is on the theory of a conspiracy *to aid and abet* in the distribution of heroin (emphasis added).

Notwithstanding the confidence of the majority that there exists such a crime as a "conspiracy to aid and abet", we contend that such a formulation is redundant, *non* sequitur, and not based upon any cases cited in the majority opinion which have even remotely discussed the issue. The hallmark of a conspiracy is the illicit agreement [*Ianelli v. United States*, 420 U.S. 770, fn. 10 (1975)]. A conspiracy "to aid and abet" necessarily stamps claimed accessorial conduct with the same element of concert or agreement which characterizes an ordinary conspiracy. The construct -- "a conspiracy to aid and abet" -- therefore, in effect, proposes the anomaly of a conspiracy to conspire. Such a theory of criminal liability is nonexistent.

Ordinarily, there is no need to prove an agreement where aiding and abetting is concerned [*Pereira v. United States*, 347 U.S. 1, 11 (1974)]. Where, however, as in this unusual case, the appellate court has engrafted onto the claimed conspiracy the more particular purpose to "aid and abet", the normal distinction between the two concepts becomes obliterated. The concept of concert and prior agreement suffuses the new entirety and a conspiracy to conspire seems to be the only logical offspring of this wholly unconventional union of conspiracy and aiding and abetting. In this connection, it should not be overlooked that aiding and abetting under 18 U.S.C. §2 is not a crime; but merely makes one punishable as a principal where one assists in the commission of a substantive crime [*United States v. Campbell*, 426 F. 2d 547 (2 Cir. 1970)]. Agreeing with others to act together as accessories is all that conspiring to aid and abet appears to mean and we, frankly, see no difference in this formulation from what the word "conspiracy", by itself,

connotes in law. The coinage of the Court of Appeals is, thus, meaningless and seeks only to salvage a conviction of petitioner which that court found wanting in law when styled as a simple conspiracy to distribute heroin. On this ground alone, the worthiness of a grant of certiorari is evident.

Joinder of the aiding and abetting concept to that of conspiracy supposes a union of ideas that have historically been at odds [*see United States v. Alvarez*, 610 F. 2d 1250, 1254 fn. 3 (5 Cir. 1980)]. Insofar as conspiracy is concerned, there is no requirement that the target crime of the criminal agreement ever be consummated [*Ianelli v. United States*, 420 U.S. 770 (1975)]. On the other hand, aiding and abetting is not definitional of a crime, but merely renders principals of those who assist in the consummation of a particular offense. Unless the substantive crime to which the aiding and abetting is claimed to relate is completed, no aiding and abetting may be found to have occurred [*United States v. Cades*, 495 F. 2d 1166 (3 Cir. 1974); *United States v. Hyatt*, 565 F. 2d 229 (2 Cir. 1977); *United States v. Alvarez*, 610 F. 2d 1250 (5 Cir. 1980); *United States v. Ruffini*, 613 F. 2d 408 (2 Cir. 1979)]. The pairing of conspiracy to aiding and abetting thus produces an immediate tension born of this question: if it is a hallmark of conspiracy that consummation of the substantive crime is irrelevant, and the opposite is true of aiding and abetting, are not the two concepts irreconcilable? We contend that the two concepts are mismatched and mutually repelling — and this explains both the utter scarcity of cases involving conspiracy to aid and abet, and why the Court of Appeals was at a loss to cite a single case in which the mating of conspiracy (the inchoate crime) to aiding and abetting is even discussed as a legal phenomenon, much less explained as to its validity. The eagerness of the Court of Appeals majority, led by only one regular Court of Appeals

judge, to promote aiding and abetting as a logical conspiratorial adjunct, deserves serious scrutiny, and the question thus presented is clearly worthy of some guiding pronouncement from this Court.

We are also disturbed that the Court of Appeals majority was satisfied to affirm on a theory never posted in the indictment, never raised by the government, and never addressed by the trial court in its instructions (*cf. Nye & Nissen v. United States*, 336 U.S. 613, 618, 628).[4] Of course, in such a setting, the defense had no opportunity whatsoever either to try the case against such a view or to deal with it in any way before either the court on legal grounds, or before the jury on a factual basis. This constitutes a denial of petitioner's right to a jury trial on the most vital issue in this case. Neither were petitioner and his codefendants called upon to deal with the matter in the very brief oral arguments permitted on the appeal below. Such a deprivation in a case involving drastic prison sentences demands, at the least, a reversal and a new trial.

The main opinion is deficient also in ignoring, as Judge Oakes would not do, that a single conspiracy cannot be fashioned out of the distribution of "diluents — legal substances — which ultimately go out to 'spokes' that are the agents of different heroin conspiracies. See *Kotteakos v. United States*, 328 U.S. 750 . . ." (17a).

Insofar as the majority perched their view on a theory of aiding and abetting *the object of the conspiracy*, Judge Oakes noted that in an aiding and abetting situation "the Government must show [but did not show] evidence of the particular

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4. Unlike the situation in *Nye & Nissen*, no instructions were given in the instant case on the meaning of aiding and abetting. Nor was this concept contrasted to or distinguished from the concept of conspiracy.

narcotics operation that the supplier aided. See *United States v. Licursi*, 525 F. 2d 1164, 1167 (2d Cir. 1975) . . .". This omission in the proofs was ignored by the majority in its efforts to salvage the convictions.

It is also to be noted that the majority opinion below on aiding and abetting was satisfied that a specific omission to charge 18 U.S.C. §2 in an indictment can be overcome by mere implication, that is, by "reading in" by the court of those words if it so desires. The cases cited by the majority on this point (13a) deal only with substantive offenses, and not with the crime of conspiracy, thus making this case a novelty on still other grounds than the 'novelty' explicitly admitted in the decision below (3a). Even if this were a distinction without a difference, the seeming extent of the permissible reconstruction by implication should be only to permit "aiding and abetting *of a* conspiracy", (rather than "conspiracy to aid and abet"), for it is the crime of "conspiracy" which was charged in the indictment. The implication, or reading in, of aiding and abetting, where allowed, would be as a modifier only for the main charge of conspiracy; and, there is no authority for reading in, or implicating, the theory of aiding and abetting as to the substantive objective of the conspiracy.

The majority below was otherwise clear that the injection of the concept of "aiding and abetting of a conspiracy" would be to no avail in proving membership in a conspiracy under the rule enunciated in *United States v. Middlebrooks*, 618 F. 2d 273, 278-279. One must consciously intend to be a member of a conspiracy—and that requirement is not satisfied merely by an implication that by certain acts a defendant has aided and abetted a conspiracy. In this completely novel case the Court of Appeals in effect denied the defendants a jury trial on the issue of aiding and abetting and chose to read 18 U.S.C. §2 into the

case—at the appellate level—not as to the crime charged in the indictment, but as to the object or purpose for which the crime (conspiracy) was entered into.

In connection with the foregoing, it is also worthy of serious note that the cases involving "reading in" of the concept of aiding and abetting relied upon by the Court of Appeals do *not* appear to take place at the appellate level in the first instance, but rather in the trial court where the new concept of criminal responsibility could still be dealt with, and opposed by counsel, both on the law and the facts [*i.e., United States v. Walker*, 621 F. 2d 163, 165-166 (5 Cir. 1980); *United States v. Ramsey*, 374 F. 2d 192, 196]. Indeed, in the two other cases relied upon by the panel below it is also seen that the *explicit* theory and facts showing aiding and abetting were set forth in the indictment (*Jin Fuey Moy v. United States*, 253 Fed. R. 213, *aff'd*, 254 U.S. 189; *United States v. Knickerbocker Fur Coat Co.*, 66 F. 2d 388, 390).

Against this background, it is clear that the majority decision in this case on the aiding and abetting theory is a complete novelty--in which Judge Oakes refused to participate--and that the decision below improperly deprived the defendants of a jury trial since the factual basis for the affirmance was in no way set forth in the indictment or presented to the jury or referred to by the government at any stage of the proceedings including the appeal itself. (United States Constitution, Amendments Five and Six).

## II.

**The finding that the sale of benign ingredients is violative of the federal drug conspiracy statute is erroneous.**

The majority opinion below recognizes that, notwithstanding the 'black letter' of the indictment which charges a conspiracy to sell heroin, the evidence at trial, and the court's instructions, nonetheless portrayed this case as one where the defendants did no more than distribute mannite and quinine to their respective customers whose known purpose was to combine these diluents with heroin acquired elsewhere for ultimate street distribution. We contend that the panel below has erred on the facts shown in this case in treating mannite and quinine as subject matter coming within the conspiracy provision of the federal drug statute (21 U.S.C. §846). We urge this construction based upon the fact that these substances are not outlawed by federal drug schedules and because the defendants herein acted separately to sell their respective customers mannite and quinine — there being no common pool of heroin involved nor any connection between the diverse buyers who utilized these mixes. [*See United States v. Falcone*, 109 F. 2d 579 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940).]

The Court of Appeals below overlooked the fact that the sale or distribution of diluents, such as mannite and quinine, is not outlawed either by 21 U.S.C. §841 or by the drug schedules provided for under that section. The court below similarly overlooked the fact that 21 U.S.C. §846, which deals with conspiracy, is a provision whose scope is specifically limited by the parameters of §841 — the substantive crime section relating to drug distribution or sale. In short, if substantive conduct is not proscribed by §841, the section dealing with conspiracy (§846) should not transmute such inactionable conduct into a conspiratorial crime.

In this case of first impression, the Court of Appeals also overlooked the fact that Congress has repeatedly refused to outlaw sales of mannite or quinine even though such items are knowingly sold for the purpose of being communited with heroin. On this subject we specifically advert to that part of our original appendix in the Court of Appeals (A325-A327), which illustrates the refusal of Congress to regulate diluents (17a fn. 9). Likewise, we think it crucial that although the attorney general has broad power to enumerate and outlaw drug precursors (21 U.S.C. §811), he has never chosen to do so as regards the substances in this case (quinine and mannite).

The Court of Appeals observed in its opinion that one can become a member of "a heroin conspiracy merely by supplying diluent chemicals to it. See *United States v. Barnes*, 604 F. 2d 121, 154-155 . . . cert. den. . . ." (16a). We do not quarrel with the suggestion that a supplier of a vital chemical ingredient to a *particular* heroin conspiracy, by his action, arguably joins *that* particular conspiracy. We do contend, however, that in this case no defendant was accused in the indictment or at trial of being a coconspirator within any *particular* heroin combine or any group of drug combines by virtue of supplying 'mix' powders to any of them. In the instant case, in the Court of Appeals, each defendant was said additionally to be *a coconspirator of the other* in an overall plan on their part to service a multitude of unrelated heroin dealers who were neither defendants in this case nor denominated as coconspirators with the defendants on trial. In the *Barnes* case, *supra*, the lodestone of criminality affecting the diluent supplier was the controlled narcotic being worked upon *in the particular combine* to which he supplied the mixer. In the instant case, each defendant, although distant from his codefendants' customers or codefendants' particular heroin fabricator, was, in effect, found by the majority to be infected by the criminal activities of that collateral or distant conspiracy.

What the majority panel opinion failed to discuss, however, is how a particular seller of mannite who has had *no* dealings whatsoever with various separate and distinct heroin conspiracies can or should be viewed as a confederate in all those enterprises. The assumption is simply made, *ipse dixit*, that the criminal polarity of each particular heroin conspiracy radiates beyond its discrete membership (including its particular mannite supplier) to every other mannite supplier dependent upon the same source of diluent. The logic of *Barnes*, which served in that case to endow a benign mixer with vital criminal effect under the drug laws, actually, has no bearing in this case. A particular defendant's complicity in selling mannite to a separate heroin conspiracy does not, in logic, fasten upon each and every mannite-selling associate a membership in every separate and distinct heroin conspiracy which is a recipient of mannite, originating several steps back, from a single source. To conclude otherwise, as the court below did, was to erase the line of demarcation separating each separate heroin ring, and to bring each group of conspirators under one umbrella as a grand convention of coconspirators including among all others each and every separate purveyor of mannite. A conclusion of this sort renders the concept of conspiracy inoperable as a working device by which to define the parameters and membership of a drug conspiracy. The decision of the Court of Appeals in *United States v. Cambindo*, 609 F. 2d 603, signals that not every common circumstance affecting a group of persons diversely engaged in the drug trade serves to unite them in a conspiratorial way. Lacking, as this case clearly does, a common pool of narcotic drugs or a singular identifiable common source of heroin, which are the typical hallmarks of the decided conspiracy cases, there could be no common conspiracy uniting all the defendants.[5]

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5. Judge Oakes, as a minority, clearly shared this view with defendants (17a-18a).

We thus hope to bring before this Court, the realization that the majority decision below extends the high water mark of conspiratorial complicity in drug cases much further than justice or logic should allow.

## CONCLUSION

It is respectfully requested that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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OZRO T. WELLS
*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A — SLIP OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 783, 997, 998, 999, 1051, 1052
—September Term, 1979

(Argued June 16, 1980 Decided February 9, 1981)

Docket Nos. 79-1407, 79-1456, 79-1458, 79-1477, 79-1486, 79-1496

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UNITED STATES of AMERICA,

*Appellee,*

—v.—

LEROY PERRY, LEROY BUTLER, CHARLES CAMERON, DONALD DEWEES, ARTHUR GIBBONS, and WILLIE EARL PATTERSON,

*Appellants.*

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Before:

OAKES and VAN GRAAFEILAND, *Circuit Judges*, and NICKERSON, *District Judge.**

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Appeals from judgments entered in the United States District Court for the Eastern District of New York, Jacob Mishler, *Judge*, convicting appellants after a jury trial of conspiring to distribute heroin in violation of 21 U.S.C. § 841(a)(1). Held that appel-

* Of the Eastern District of New York, sitting by designation.

lants were properly convicted under 21 U.S.C. § 846 for conspiring to violate 21 U.S.C. § 841 by aiding and abetting the distribution of heroin and that other grounds for reversal urged by appellants were either properly dealt with by the district judge or harmless error.

Convictions affirmed.

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JEROME H. FIELD, Brooklyn, N.Y., *for Appellant Leroy Perry.*

LAWRENCE K. FEITELL, New York, N.Y. (Ozro T. Wells, New York, N.Y., on the brief), *for Appellant Leroy Butler.*

LAWRENCE K. FEITELL, New York, N.Y., *for Appellant Charles Cameron.*

IRVING PERL, New York, N.Y., *for Appellant Donald Dewees.*

MARGUERITE SPENCER HINES, New York, N.Y., *for Appellant Arthur Gibbons.*

PETER J. MALONEY, New York, N.Y. (Harold B. Foner, Brooklyn, N.Y., on the brief), *for Appellant Willie Earl Patterson.*

LAURENCE A. URGENSON, Assistant United States Attorney (Edward R. Korman, United States Attorney for the Eastern District of New York, Harvey M. Stone, Victor J. Rocco, Assistant United States Attorneys, on the brief), *for Appellee.*

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*Appendix A*

OAKES, *Circuit Judge*:

This case, dealing with the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 841(a)(1), 846, is here on appeal from judgments of conviction in the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. This appeal presents a novel question—whether members of a single distribution network for substances (mannite and quinine), which are themselves legal uncontrolled but which are used as agents for cutting heroin, can be prosecuted for one conspiracy by virtue of their common source, their knowledge of one another's position in the network, and their intent that the uncontrolled substances would be used as cutting agents, despite the fact that the conspirators were simultaneously involved in different independent networks which distributed the illegal element, heroin. Put another way, where the raw heroin utilized for manufacture of the final "street" product did *not* come from a common source or from a new common pool, may there be conspiratorial liability for selling uncontrolled dilutant compounds to the different and, so far as appears, unconnected heroin dealers? My colleagues affirm on the basis that appellants were properly convicted under 21 U.S.C. § 846 for conspiracy to violate 21 U.S.C. § 841 by aiding and abetting the distribution of heroin.[1] I disagree,

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1 The appellants were sentenced as follows:

On December 7, 1979, appellant Willie Earl Patterson was sentenced to a prison term of seven years, a special parole term of five years, and fined $10,000. Appellant Charles Cameron was sentenced to a prison term of five years and a special parole term of five years. The court suspended imposition of sentence upon appellant Leroy Perry and imposed a five-year term of probation to run concurrently with a special parole term imposed on May

but because two of the principal alleged coconspirators were themselves substantial heroin dealers I would hold that any error as to them (and their respective confederates) was harmless. I would, however, reverse as to appellant Donald Dewees.

## FACTS

The facts need not be spelled out in great detail. One Canadian pharmaceutical source of mannite and quinine, Joel Merling, sold vast quantities of these uncontrolled substances which are, and in certain cases were proven to be, used as heroin cutting agents, or "diluents" (although they can be used, respectively, for laxative or medicinal purposes), to a New Yorker, Hyman Lieberman. Lieberman stored the substances in his store on the lower East Side of Manhattan and resold them with the aid of Israel (Paddy) Pollack. Pollack was friendly with and had access to various members of the black community in Harlem, including the appellants and other people in the drug business.

In July of 1974 Lieberman and Pollack employed Gerald Gewirtz to pick up and unload incoming shipments of mannite and quinine, and to make deliveries

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11, 1978, in the Southern District of New York, *see United States v. Gibbons*, 602 F.2d 1044 (2d Cir.), *cert. denied*, 444 U.S. 950 (1979).

On December 14, 1979, appellant Arthur Gibbons was sentenced to a prison term of thirteen years, five months, and a special parole term of life to run concurrently with a sentence imposed on May 9, 1978, in the Southern District of New York, *see Gibbons, supra*.

On December 21, 1979, appellant Leroy Butler was sentenced to a prison term of fifteen years, a special parole term of ten years, and fined $25,000. Appellant Donald Dewees was sentenced to a prison term of eight years and a special parole term of twelve years.

to Pollack's customers. Gewirtz, apprehended on another charge in June 1976, became an informant and thereafter for six months made deliveries of some seventy-four boxes of mannite weighing twenty pounds each to appellants, their apartments, their vehicles, their stores or shops, and, in the case of Leroy Butler, his New Jersey home. These deliveries were monitored, that is, they were under police surveillance. Sales prices to appellants totaled tens of thousands of dollars, and credit was extensively used. Gewirtz testified as to heavy mannite-quinine traffic and his deliveries in late 1976 were substantiated by photographs and tape recordings.

The other chief Government witness was Frank Lucas, the well-known Harlem drug trafficker who is currently serving consecutive federal and state prison terms totaling seventy years. Lucas testified as to transactions with appellant Butler throughout 1974 in which Butler gave him mannite and quinine in exchange for heroin. These transactions took place at the Audubon Garage in Washington Heights. The garage was owned by a corporation in which Butler was a stockholder and on behalf of which appellant Arthur Gibbons at one point served as a leasing agent. Lucas on occasion played cards with Butler and Pollack at the Audubon Garage, and Gewirtz made a number of mannite-quinine deliveries there. Lucas's and Butler's dealings were arranged during meetings either at a Harlem social club or at the Bridge Apartments (located across the street from the Audubon Garage) where Butler had an apartment and where, from time to time, Gewirtz also brought mannite and quinine to Butler or to Willie Earl Patterson. Lucas testified to three sales of heroin to

Butler in 1974: one in late spring or early summer of a half kilo paid for by Butler with $60,000 and an amount of mannite and quinine; a second in mid-summer of a half kilo delivered to Butler at the Bridge Apartments; and a third sale in late 1974 of a half kilo paid for in "cash and cut."

Lucas also testified to appellant Charles Cameron's association with Butler, as well as Cameron's own statements about delivering "bundles" (packages containing fifty-five bags of heroin) for Butler, later distributing them in Washington, D.C., and Miami, and meeting with a source for heroin passingly familiar to regular readers of Second Circuit opinions.[2] In addition, Gewirtz testified that Pollack told him that Cameron was a heroin dealer whose payment was guaranteed by Butler and to whom Pollack sold as a favor to Butler, thus tying Cameron to Butler during the period of the indictment. Cameron himself also stipulated that he received three boxes of mannite in 1976 intending to sell and distribute it with knowledge and intent that it would be mixed with heroin.

Lucas further testified to purchases of mannite and quinine from appellant Donald Dewees and his sale to Dewees of an eighth of a kilo of heroin in 1974, as well as Dewees's complaints about needing higher quality heroin. The record given no indication, however, that during the period of the conspiracy Dewees was a heroin dealer,[3] though he was tied to Cameron, who,

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2 We refer to Ralph "The General" Tutino, who appeared among the *dramatis personae* in, *e.g.*, *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

3 In one conversation, when Gewirtz got too friendly for Dewees's taste, Dewees stated that he just made pennies and did not know what his customers did with the mannite.

immediately after the first delivery to him by Gewirtz, went to one of Dewees's bicycle stores at 125th Street and Fifth Avenue. Dewees was also linked to Butler by way of a payment book in Butler's possession bearing the name Arthur Dewees, Arthur being appellant's middle name. After his arrest and *Miranda* warnings Dewees commented that his arrest "must be for conspiracy because he hadn't made any moves [*i.e.*, purchases or sales of narcotics] for a long time." And in the course of three deliveries of mannite or quinine by Gewirtz, Dewees gave him or Pollack a total of $20,400 for Pollack or Lieberman.

Appellant Patterson, who owned a variety shop at 125th Street and Fifth Avenue,[4] was even more closely tied to Butler. On four occasions deliveries were made to him at the Bridge Apartments garage between 178th and 179th Streets, across from the Audubon Garage where Gewirtz had previously delivered, and was subsequently to deliver, mannite for Butler. When stopped on one occasion after leaving the Bridge Apartments garage, Patterson claimed that the boxes (of mannite) in his car trunk contained popcorn. Testifying in his own defense Patterson conceded that he had known Butler and had been at Butler's New Jersey home (where various deliveries were made), though not in 1976, despite the fact that a detective observed his brown Cadillac there on October 14, 1976. Patterson also testified to being at the Butler-owned Audubon Garage (where some deliveries were made to Butler), but only to use the parking facilities.

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[4] Patterson's variety store apparently was a few doors away from one of appellant Dewees's bicycle shops.

Gibbons, who owned Joe's Barbershop and was himself a street dealer, and Leroy Perry, the "old man" who worked for Gibbons, bought large quantities of mannite and quinine from Pollack for which Gibbons was often in debt. Gibbons and Perry are tied if at all to the Butler heroin enterprise only by the following facts: on one occasion Gewirtz picked up a bag of quinine from Perry at the Eighth Avenue and 131st Street barbershop, which he delivered together with a box of mannite on an "emergency" basis (according to Pollack) to Dewees; Gibbons stated after his arrest (and *Miranda* warnings) that he had bought heroin from Pollack at the Audubon Garage, well uptown from the barbershop; Gibbons stipulated that he had leased the Audubon Garage in 1974 on behalf of the 264 Audubon Corporation to one Ellie Williams and one Isaac Hamilton, indicating a possible garage relationship between Gibbons and Butler.[5]

## DISCUSSION

### A. *Jury Instructions*

The appellants object to that portion of the jury charge quoted in the margin[6] on the basis that it

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[5] Gibbons and Perry also stipulated to separate conversations in 1977 with others relating to heroin or mannite sales. Gibbons's conversations were with two of his codefendants in *United States v. Gibbons*, 602 F.2d 1044 (2d Cir.), *cert. denied*, 444 U.S. 950 (1979).

[6] The conspiracy charged in this indictment is limited to the alleged conspiratorial activity relating to dealing in manite [*sic*] and quinine, and imported by Lieberman and Pollack, and then sold and distributed by Lieberman, Pollack and Gewirtz

failed to restrict the conspiracy of which they were accused to a conspiracy whose object was the distribution of heroin.[7] Judge Mishler did tell the jury that "[t]he conspiracy charged in this indictment is a conspiracy to deal in heroin." He advised the jury that neither mannite nor quinine was a controlled substance, and that the charge was conspiracy to distribute a controlled substance or to possess with intent to distribute a controlled substance. The court also repeatedly charged, however, that "[t]he conspiracy charged in this indictment is limited to the alleged conspiratorial activity relating to dealing in manite [*sic*] and quinine," and that the Government had to prove that the defendants had agreed "to deal in manite [*sic*] and quinine with the intent and with the knowledge that it was to be used for mixing with heroin."

After careful review of the charge as a whole we essentially agree with appellants' assertion and con-

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to Butler, Patterson, Donald Dewees, Andre Dewees, Arthur Gibbons, Leroy Perry and Charles Cameron.

This is the conspiracy the government is required to prove.

. . . .

What the evidence in this case must show . . . is that the members [of the conspiracy] in some way . . . came to a mutual understanding to deal in the manite [*sic*] and/or quinine that was exported from Canada . . . .

7 The indictment also could be viewed as ambiguous as to the conspiracy charged. The indictment states that it was part of the conspiracy both that "certain of the defendants and co-conspirators . . . would receive quantities of mannite and quinine to be mixed with heroin" and that "various defendants and co-conspirators would knowingly and intentionally distribute quantities of heroin." However, we believe that these specifications should be read solely as alleged as overt acts, and that in any event Judge Mishler's charge to the jury resolved any possible ambiguity.

clude that the jury charge centers on the allegation that the appellants had agreed to distribute diluents with the intent that they be used in heroin distribution, rather than on the allegation that they had agreed directly to distribute heroin. We believe that the intention on the part of the appellants that their concerted efforts aid the distribution of heroin defines what the trial judge meant when he said that the conspiracy charged was "a conspiracy to deal in heroin," and that no juror could reasonably have understood those instructions to mean that in order to convict the jury had to find that the defendants were all part of one heroin distribution network. Thus we conclude, on the basis both of the charge and the colloquy preceding it, that the defense attorneys were not misled as to the elements which Judge Mishler deemed the Government must prove. Having so concluded, we reach the principal question, whether those elements charged constitute a conspiracy in violation of 21 U.S.C. § 846.

In addition, the judge properly included in the jury charge the possibility of multiple conspiracies, in language which we substantially approved in *United States v. Cambindo Valencia*, 609 F.2d 603, 625 (2d Cir. 1979); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977); and *United States v. Tramunti*, 513 F.2d 1087, 1107 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).[8]

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[8] The court charged, "to find a defendant guilty you must find that he was a member of that conspiracy charged in the indictment and not some *subsequent* conspiracy" (emphasis added). The world "subsequent" was used here in place of the word "other" in the charge approved in other cases, but the defendants did not object to this.

B. *Conspiracy*

On the key question in the case my colleagues are of the opinion that appellants were all shown to have agreed to distribute diluents with the intent that they be mixed with heroin and distributed by one or more heroin networks and that this was sufficient to sustain a conviction under 21 U.S.C. § 846 for conspiring to violate 21 U.S.C. § 841 by aiding and abetting the distribution of heroin. They hold that the knowing supply of a raw material necessary for the commission of a crime by another constitutes aiding and abetting that crime. Under 18 U.S.C. § 2(a) whoever "aids, abets, counsels, commands, induces or procures" the commission of a crime is punishable "as a principal," and under 18 U.S.C. § 2(b) whoever "causes" the commission of a crime is likewise punishable "as a principal." While conspiracy is a crime distinct from the substantive crime which is the object of the conspiracy, 18 U.S.C. § 2 does not create a separate crime. It simply makes an aider and abettor a principal, and one who aids and abets a violation of a statute has violated that statute. *Nye & Nissen v. United States*, 336 U.S. 613, 618-20 (1949); *United States v. Oates*, 560 F.2d 45, 53-55 (2d Cir. 1977).

They point to other circuits that have affirmed convictions for conspiracy to aid and abet a crime, *United States v. Marino*, 617 F.2d 76, 78 (5th Cir. 1980) (affirming a "conviction for unlawfully conspiring to aid and abet the crime of bail jumping"), or conspiracy to "cause" another to commit a crime. *United States v. Giese*, 597 F.2d 1170, 1179 (9th Cir.) (conspiracy to cause others to destroy government property), *cert. denied*, 444 U.S. 979 (1979); *United States v. Lupino*, 480 F.2d 720, 724 (8th Cir.) (con-

spiracy by at least four individuals to cause one of them to receive a firearm unlawfully), *cert. denied*, 414 U.S. 924 (1973); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966) (conspiracy to violate civil rights by causing a false arrest), *cert. denied*, 385 U.S. 1002 (1967). In these cases the conspiracy was a violation of the general statute, 18 U.S.C. § 371, making it a crime to conspire "to commit any offense against the United States." The courts reasoned that an act made criminal by 18 U.S.C. § 2 is an "offense" against the United States and had no difficulty in finding a conspiracy to commit an inchoate offense. *See also Singer v. United States*, 323 U.S. 338 (1945) (holding as a matter of statutory construction that members of a conspiracy to aid one of their number to evade the draft violated the draft statute).

My colleagues point out that there appear to be no reported cases involving a conspiracy to aid and abet violations of the drug laws. But they hold to the view that there is no reason why the result should be different. This is because 21 U.S.C. § 846 refers to any conspiracy whose object is "to commit any offense defined in this subchapter." The crucial language is identical to that used in 18 U.S.C. § 371, and, they maintain, the congressional purpose to strengthen remedies against organized drug traffic, *United States v. Bommarito*, 524 F.2d 140, 144 (2d Cir. 1975), hardly suggests a narrower reading.

The conspiracy need not be, their argument runs, to aid only one identified heroin distribution network. To show a violation of 18 U.S.C. § 2 it is not necessary to identify any principal at all, provided the proof shows that the underlying crime was committed by someone. *United States v. Gleason*, 616 F.2d 2,

20-21 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980), and cases cited. Moreover, a defendant who simultaneously aids more than one criminal venture may be found guilty for aiding each. A single conspiracy may have more than one criminal object, and there is no reason why a single conspiracy whose objects are to aid and abet different heroin distributors should not be encompassed by 21 U.S.C. § 846.

It is true, my colleagues state, that the indictment and the jury instructions did not spell out in so many words that defendants could be found guilty of "conspiring to aid and abet" the distribution of heroin. Nor were those words mentioned by the prosecutor. But the precise language, they hold, is unimportant provided that all the elements necessary to find a conspiracy to aid and abet were fairly put to the jury. Certainly, they maintain, the provisions of 18 U.S.C. § 2 can be read into an indictment which specifically charges only a substantive offense. *Jin Fuey Moy v. United States*, 254 U.S. 189 (1920); *United States v. Walker*, 621 F.2d 163, 165-66 (5th Cir. 1980); *United States v. Knickerbocker Fur Coat Co.*, 66 F.2d 388, 390 (2d Cir.), *cert. denied*, 290 U.S. 673 (1933).

To convict a defendant as an aider and abettor the Government must show only "that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The elements of the offense are: the commission of the underlying offense by someone, a voluntary act or omission, and a specific intent that such act or omission promote the success of the underlying criminal offense.

In a conspiracy to aid and abet, my colleagues' position continues, two different specific intents must be shown: that the individual intentionally agreed with the other conspirators and that one of their common objects was an intent to further the underlying offense. Chief Judge Mishler's charge to the jury contained both of these elements, and required the jury to find that the defendants intended that the diluents be used in the making and distribution of heroin.

To find such a conspiracy it is, of course, necessary to show that the defendants have agreed to pursue a common criminal objective. It is my colleagues' position that as in the case of any other conspiracy involving a drug related "enterprise," the agreement to pursue the objective of aiding several heroin distribution networks can be inferred from each individual's knowledge that others were performing related tasks and his conscious dependence on them for his own profits. This in turn can be inferred from the nature of the operation and the individual's place within it. *United States v. Barnes*, 604 F.2d 121, 154-55 (2d Cir. 1979), *cert. denied*, 446 U.S 907 (1980); *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977). The jury was entitled to draw these inferences, although they may be less compelling in the case of a diluent distribution network than in the case of a single network distributing heroin. It would of course be insufficient to find merely that different members of a group were each aiding different heroin distributors. To show a conspiracy it is not enough to prove that a group of individuals had similar criminal aims. *Kotteakos v. United States*, 328 U.S. 750 (1946).

*Appendix A*

The evidence examined in the light most favorable to the Government is sufficient—in my colleagues' view—to support a verdict finding appellants guilty of a conspiracy to aid and abet the distribution of heroin. The existence of a conspiracy was amply demonstrated by the testimony of Gewirtz as to his suppliers and deliveries of the diluents and by inference from each customer's constructive knowledge that other customers and suppliers were involved. The singularity of the conspiracy is evidenced, my colleagues maintain, by the single distribution network and the ties among the various defendants (particularly the close connections among Butler, Cameron, Patterson and Dewees, and between Perry and Gibbons), the operation by Pollack, a supplier, for a time out of Butler's garage, and the emergency delivery of quinine from Perry to Dewees. That the appellants' object and intent was to aid the distribution of heroin through the distribution of diluents is evidenced by the connections they individually possessed to heroin distribution networks, the massive quantities in which they dealt, and the various stipulations (Cameron) or inculpatory statements (Dewees, Gibbons, Perry) relating to their knowledge and intent. The particular heroin distribution networks aided were those of Butler and Gibbons. It is unnecessary to show that the conspiracy actually aided any particular sale of heroin since a conspiracy can be found though its object has not been achieved.

My colleagues do point to a difference between punishing an agreement to commit an act intended to aid another crime (a "conspiracy to aid and abet") and imposing conspiratorial liability on one who, without agreement, merely assists conspirators in

achieving their object (an "aiding and abetting of a conspiracy"). While the first is appropriate, they say, the second is not. *United States v. Middlebrooks*, 618 F.2d 273, 278-79 (5th Cir.), *modified in part*, 624 F.2d 36 (5th Cir. 1980). But in this case, they hold, there is clear evidence that a conspiracy existed whose object was to aid and abet a crime and that the defendants intended to assist in bringing about that crime through their concerted actions.

My own approach is entirely different. I would not reach the question whether these appellants could have been found guilty of conspiracy to aid and abet the distribution of heroin. This was not the charge under the indictment or the instruction of the court. Rather, we look to the evidence to determine whether it was sufficient to submit the issue of single-multiple conspiracies to the jury, as we said is "ordinarily" for the jury in *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977).

On the key question in the case I start with the proposition that an individual, knowing the nature of the enterprise and the interdependence of its members, can become a member of a heroin conspiracy merely by supplying legal diluent chemicals to it. *See United States v. Barnes*, 604 F.2d 121, 154-55 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). Presumably such a supplier could also be convicted of (although these appellants were not charged with) a substantive narcotics offense as an aider and abettor under 18 U.S.C. § 2. But in each such case the Government must show evidence of the particular narcotics operation that the supplier aided. *See United States v. Licursi*, 525 F.2d 1164, 1167 (2d Cir. 1975); *Develop-*

*ments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 934 (1959). The question here in my view then becomes whether the appellants can be convicted for an agreement to distribute uncontrolled substances[9] to *various* heroin operations.[10]

To be sure, there were some "horizontal" links among appellants: Perry and Gibbons were associates, as were Butler, Cameron, and Patterson, and Perry gave some quinine back to Gewirtz when Dewees needed it. But it is clear to me that the basic structure of this "enterprise," *see United States v. Cambindo Valencia*, 609 F.2d 603, 623 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2163 (1980), is that of a "spoke" conspiracy, *see Kotteakos v. United States*, 328 U.S. 750 (1946), with diluents going from a central source to two or more distributors who operated independently of one another. The cases dealing with narcotics conspiracies, however, all involve combinations in which there was a common *unlawful* element—either a controlled dangerous drug coming from a common source and distributed by a combination, or a common narcotic pool drawn from various sources and utilized by the combination. *See, e.g., United States v. Taylor*, 562 F.2d 1345, 1350-54 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977); *United States v. Tramunti*, 513 F.2d 1087, 1105-07 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). None involves a common

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9 There is some evidence in the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 that Congress was urged to control diluents, but it did not do so. *See Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 18583 Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 329-30 (1970).

10 At the very least, the heroin operations of Butler and Gibbons were not shown to be the same.

source of diluents and *various* narcotics networks. A single conspiracy cannot be constructed in my view where the source is distributing diluents—legal substances—which ultimately go out to "spokes" that are the agents of different heroin conspiracies. *See Kotteakos v. United States*, 328 U.S. 750 (1946) (similarity of illegal purpose of each spoke in dealing with hub does not constitute a common purpose and a conspiracy among the spokes).

Thus here, as in *United States v. Cambindo Valencia*, 609 F.2d 603, 626 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 2163 (1980), the Government appears to have presented a series of transactions involving at least two groups who were, if anything, "friendly" competitors in the Harlem drug trade, and who were not fused into a single enterprise despite receiving diluents from the same distributor. Although the indictment charges only one conspiracy, the proof shows more than one. But this variance is not necessarily fatal and does not automatically require reversal. *See United States v. Miley*, 513 F.2d 1191, 1207-08 (2d Cir.) (affirming convictions despite variance), *cert. denied*, 423 U.S. 842 (1975). "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger v. United States*, 295 U.S. 78, 82 (1935). It therefore in my view becomes necessary to inquire, as in *Cambindo Valencia*, into the possible prejudice against particular defendants from being tried as members of a single conspiracy, the strength of the evidence offered to show the existence of particular conspiracies, and the membership of each defendant in one or more of such conspiracies involving the actual sale of heroin.

Appellant Butler is readily identifiable as a large-scale trafficker in heroin over a long period of time. Gibbons is also clearly the operator of a separate enterprise. The question, then, is whether the prejudice from evidence relating to the discrete Butler conspiracy spilled over to affect the charge against Gibbons and his confederate Perry, or vice versa. Without such prejudicial spillover, there is merely a variance between the single conspiracy charged and the two proved at trial, which would not warrant reversal. Only if prejudicial spillover is shown must a conviction be reversed. *See Cambindo Valencia*, 609 F.2d at 628-29; *United States v. Bertolotti*, 529 F.2d 149, 155-58 (2d Cir. 1975).

On the spillover question I have no problem whatsoever with Butler and his confederate Cameron. There was substantial evidence that they were engaged in a joint criminal enterprise involving the sale of heroin as to which the purchase of diluents was a necessary preliminary step in the manufacture of the street product. Butler and Cameron were operating on a large scale, Cameron sometimes alone to be sure but often as a lieutenant of Butler.

The evidence is not as clear-cut regarding Gibbons and Perry. Although Lucas's testimony—which must have been quite powerful coming from a substantial drug dealer himself—strongly indicted Butler and Cameron, it did not relate at all to Gibbons and Perry. Nevertheless Gibbons, after being advised of his constitutional rights, stated to the arresting officers that he was receiving heroin in eighth of a kilo quantities from Paddy Pollack, that several of these transactions took place at the Audubon Garage between 178th and 179th Streets in Manhattan, that

the heroin would be cut into four or five hundred quarters, and that he made $12,000 from each eighth of a kilo of heroin. Without such statements, Gibbon's conviction would have to be reversed in my view, but with them, it does not.[11] I would resist the temptation, however, to tie the Gibbons enterprise to Butler through either their common source of diluents (the Audubon Garage locale of the Pollack transactions) or their possible joint interests in the 264 Audubon Corporation which owned the garage.

The question would still remain whether the other appellants' convictions may properly be upheld. Though the question is in a sense academic in the light of my colleagues' view, I believe that the appellant Patterson can be tied to the Butler conspiracy. The fact that deliveries were made to him at the Bridge Apartments opposite the Audubon Garage is not necessarily compelling to show a link between Patterson and Butler. For all that appears the Bridge Apartments garage was suggested by Pollack. On the other hand, in testifying in his own defense, Patterson conceded that he had known Butler and that he had been at Butler's New Jersey home, and the jury could properly have found that he was observed there by a detective on October 14, 1976. His veracity was clearly in question by virtue of his claim, when he was stopped on one occasion after leaving the Bridge Apartments garage, that boxes of mannite he had in the trunk of his car contained popcorn. There was also ample evidence to the effect that Butler's New Jersey home was used as a heroin trading center, and

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11 Of course this assumes that it be found that Gibbons conspired with someone else (Perry) to violate 21 U.S.C. § 841(a)(1).

I think the jury could properly infer that Patterson was connected to what I have termed the Butler conspiracy, without prejudicial spillover from proof as to the separate Gibbons conspiracy.

Dewees, too, could be tied to Butler—rather loosely I say—by way of Butler's payment book bearing Dewees's name and by the fact that Cameron, immediately after an observed mannite-quinine delivery, went to one of Dewees's bicycle stores at 125th Street and Fifth Avenue. But I cannot say that Dewees was not prejudiced by spillover of the evidence as to Gibbon's heroin dealings. Therefore I would remand as to Dewees for a new trial.

As for appellant Perry, who was something more than a "mule" but something less perhaps than a lieutenant for Gibbons, he nevertheless plainly knew, and indeed he stipulated that he knew, the "cut" was to be used in a heroin operation. Since he worked for Gibbons, the jury could properly infer that he was involved in Gibbon's heroin operation, and on this basis I see no prejudicial spillover from evidence regarding the Butler conspiracy as to Perry. There remain a number of other points for discussion, however.

C. *Double Jeopardy*

Appellants Gibbons and Perry make a double jeopardy argument based on similar locale and a three-month time overlap between the conspiracy charged here and the conspiracy for which they were previously tried and convicted in the Southern District of New York, *see United States v. Gibbons*, 602 F.2d 1044 (2d Cir.), *cert. denied*, 444 U.S. 950 (1979). But the two indictments charged separate and dis-

tinct crimes. The instant case involves dealing in mannite and quinine with knowledge and intent that it be mixed with heroin for distribution, from July 1974 through December 1976. The Southern District conviction involved a conspiracy in which Gibbons and Perry served as a source of heroin—"wholesalers"—for at least two street sellers of heroin (also charged in the Southern District indictment) from September 30, 1976, through March 2, 1978, a period essentially subsequent to the termination of the conspiracy charged in the instant case. *See Gibbons*, 602 F.2d at 1046.

The Southern District case did include evidence of two incidents involving diluents, but both occurred in 1977, falling outside the Eastern District indictment. Thus, following the "same evidence" test—whether the evidence required to support conviction in one of the prosecutions would have been sufficient to support conviction in the other prosecution—and giving special consideration to the potential for abuse of this test in the context of conspiracy prosecutions, *see United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States v. Mallah*, 503 F.2d 971, 985-87 (2d Cir. 1974); *cert. denied*, 420 U.S. 995 (1975), we hold that the 1974-1976 Eastern District diluent-heroin conspiracy was a crime distinct from the subsequent 1976-1978 heroin wholesale operation charged in the Southern District indictment.

D. *Search Warrant*

Butler argues that evidence seized from his New Jersey home by officers from New Jersey, from New

York, and from the federal government pursuant to a New Jersey warrant in June 1979 should have been suppressed. The articles—cocaine paraphernalia, guns, and $70,975 in cash found under the mattress in the master bedroom[12]—were introduced as similar act evidence. The affidavit supporting the warrant, sworn to by Detective Crowley of the Englewood, New Jersey, police force, described 1976 incidents at the Butler house as related by informant Gewirtz. It then skipped to 1979, describing less direct evidence that Butler was still in the drug business: television cameras at the front, side, and rear of the house to spot surveillance; automobiles (the usual Rolls Royces and Mercedes Benzes) linked to trafficking in the driveway or speeding away upon sight of the officers; and a statement by Mrs. Butler that, "[t]he Police know what Leroy is doing at the house, he pays a lot of people, he conducts his business out of the house every afternoon." She further stated to the officers that Butler did not live at the house and that he just came there every day to conduct his business.

Although the affidavit omitted any reference to the reliability of the informant Gewirtz, the 1976 information was sufficiently corroborated by the 1979 events to be considered. *See, e.g., United States v. Rollins*, 522 F.2d 160, 164-65 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Canestri*, 518 F.2d 269, 272-73 (2d Cir. 1975). And staleness was not a problem because evidence on both sides of the three-year gap indicated an ongoing narcotics "business." *See Mapp v. Warden*, 531 F.2d 1167,

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12 Butler told the searching officers that "they must have put [the money] there."

1171-72 (2d Cir.), *cert. denied*, 429 U.S. 982 (1976). Indeed, when combined with the fact that Butler was a long-time suspected drug dealer, the 1979 events alone might have been sufficient to establish probable cause to believe drugs were on the premises. Bearing in mind, therefore, the deference accorded to the magistrate, *id.* at 1172, we do not reverse his determination of probable cause to issue the warrant.

Butler also claims that the supporting affidavit was false in that it referred to Pollack's Mercedes Benz being at the New Jersey house in May of 1979, which was after Pollack had absconded, and that Butler was entitled to a hearing upon motion under *Franks v. Delaware*, 438 U.S. 154 (1978), to challenge the veracity of the affidavit. But this issue was not raised until after trial and, moreover, the fact that Pollack may have been a fugitive from a New York narcotics indictment does not demonstrate that the officer's observations were mistaken.

E. *Similar Acts*

Appellants Butler and Cameron contend that the trial judge improperly admitted evidence of certain similar acts. Specifically, Butler challenges the admissibility of various items seized during the search of his home, and Cameron challenges the admission of some of Lucas's testimony. Even if it were error to admit the evidence against Butler, on the assumption that although there was a "knowledge" or "identity" issue presented at trial of the kind justifying admission of similar acts, this evidence should have been excluded as more prejudicial than probative, *see United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980), this error was harmless because of the nature

and amount of other evidence establishing Butler's guilt.

As for Cameron's objection, Lucas's testimony that he had had heroin dealings with Cameron in 1969 does present some difficulty. In order to prevent admission into evidence of a 1975 conviction Cameron had stipulated that he had sold mannite on three occasions with knowledge of its ultimate use, thus, he argues, conceding the issue of intent. But Cameron's defense in this case was that he had not joined the larger conspiracy charged. Therefore, it was not knowledge of the use of mannite as a cutting agent but rather intent to join the Butler heroin conspiracy that was at issue; and Cameron's stipulation regarding his prior mannite dealings did not dispose of this point. It may seem difficult to understand how 1969 events are relevant to show that in 1976 Cameron agreed to participate with Butler in a heroin conspiracy, but Cameron's defense was simple that he was a little mannite dealer, and the similar act evidence as to his large-scale 1969 narcotics dealings with Lucas and Butler contradicted this. Thus, Lucas's testimony bore on whether Cameron was part of the Butler conspiracy, and the district judge properly ruled the testimony admissible.

F. *Severance*

Perry, Patterson, and Dewees complain that they were prejudiced by the admission against the other defendants of highly damaging evidence, including inculpatory statements and stipulations as well as the testimony on similar acts. Accordingly, they claim that severance was required. We have considered and accepted this in Dewee's case. With respect

to the other appellants, however, none of the similar act evidence was likely, in light of the cautionary instructions given, to prejudice them. *See United States v. Rosenwasser*, 550 F.2d 806, 808 (2d Cir.), *cert. denied*, 434 U.S. 825 (1977). And a defendant's right to confrontation under *Bruton v. United States*, 391 U.S. 123 (1968), does not come into play unless the codefendant's admission inculpates the defendant as well. *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). That did not occur here.

G. *Summation*

Cameron and Patterson complain about numerous remarks during the Government's summation. Absent flagrant abuse, they can only object now to remarks objected to below. *United States v. Dibrizzi*, 393 F.2d 642, 645-46 (2d Cir. 1968). But when appellants did object below, the court properly gave corrective instructions. Furthermore, in light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements vouching for witnesses were understandable if not laudable; and the Government's statements describing the defense's attack as a "desperate," "struggling" tactic were permissible rebuttal. *See United States v. Praetorius*, 622 F.2d 1054, 1060-61 (2d Cir. 1980).

The prosecutor's closing statement, however, was close to the line: "I submit to you that these defendants and their counsel are completely unable to explain away their guilt." Although a jury might interpret this statement as a comment on defendants' refusal to testify, *see United States v. Bubar*, 567

F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977), we believe that the trial judge's curative instructions rendered this harmless, *see id.* at 200.

H. *Juror Requesting Librium*

Appellants argue for reversal based on a note sent from one juror to her mother during deliberations, stating that she was having stomach problems, was taking tranquilizers, and needed Librium. The same juror cried when appellant Dewees was convicted. Appellants question her mental stability. *See United States v. Dioguardi*, 492 F.2d 70, 78 (2d Cir.) (verdict may be set aside only if there is "clear evidence of a juror's incompetence to understand the issues and to deliberate"), *cert. denied*, 419 U.S. 873 (1974). Judge Mishler carefully made a post-verdict inquiry, *see United States v. Moten*, 582 F.2d 654, 666 (2d Cir. 1978), and the juror explained that she had cried when appellant Dewees was found guilty because she "felt sorry" for his brother, who had been a codefendant and was acquitted, and who had wept openly when the verdict against Donald Dewees was announced. The juror also recounted that the Librium referred to in the note to her mother had been prescribed by her physician three years earlier for an ulcer condition which caused her discomfort during the trial, and stated that she neither felt disoriented nor took tranquilizers during the deliberations. Under these circumstances, and in light of the judge's own observations regarding the juror's demeanor, he quite properly decided—at least absent any bizarre behavior by the juror—not to permit further interrogation by counsel of the juror.

I. *Investigator's Character Evidence*

Appellant Perry argues that the district court improperly excluded the testimony of a private investigator hired by his wife, through whom Perry sought to introduce evidence of his good reputation in the Harlem community. In the judge's discretion he could properly exclude this testimony as hearsay, because the private investigator was merely going to testify as to a few conversations he had had with one of Perry's coworkers at the barbershop, with the minister of Perry's church, and with a laundry proprietor. It is well established that a character witness must be able to demonstrate his *own* familiarity with the defendant's reputation and his competence to speak for the community. *See Michelson v. United States*, 335 U.S. 469, 478 (1948).

J. *Statements Pursuant to Plea Agreement*

Appellant Perry also argues that his admission concerning receipt of mannite and quinine at Joe's Barbershop was made in connection with his offer to plead guilty and, therefore, should have been excluded under Federal Rule of Evidence 410. But when Perry advised the Government that he would not plead guilty, he violated his plea agreement, making it null and void. In the words of the agreement itself, "[a]ny . . . prosecution may be premised upon any information provided by Leroy Perry during the course of his cooperation and such information may be used against Leroy Perry." Because Perry's statements were made *after* the plea argreement had been negotiated and executed with advice of counsel, and not as part of an effort to gain further concessions

from the Government, and because the express provisions in the agreement made the statements usable against Perry, the court below, relying on *United States v. Stirling*, 571 F.2d 708, 730-32 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978), properly admitted them into evidence.

K. *Statements During Investigative Stop*

Appellant Patterson argues that the court should have suppressed the statement he made when stopped on June 17, 1976, that the boxes in the trunk of his car contained popcorn. At trial the Government introduced evidence that these boxes in fact contained mannite, and offered Patterson's remark as a false exculpatory statement. The trial court properly held that the officers—who had previously observed the loading of boxes of mannite into Gewirtz's car, had followed Gewirtz to the Bridge Apartments garage, and had seen Patterson exit the garage shortly thereafter with what looked like two of the boxes on his rear seat—had probable cause to believe that Patterson was involved in a drug operation and, therefore, could stop his vehicle. In response to the officers' request for some identification, Patterson had opened his trunk to retrieve an article of clothing, at which time three additional boxes, each similar in size to the ones Gewirtz had just delivered, became visible. It was at this point, when the police officers observed the boxes and asked what was inside them, that Patterson replied "popcorn." Because this investigative stop was based on reasonable suspicion, *see United States v. Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975), and the officers' request for identification, in connection with

which the boxes of mannite came into plain view, was permissible, *see United States v. Salter*, 521 F.2d 1326, 1329 (2d Cir. 1975), Patterson's statement need not have been excluded from evidence.

L. *Patterson's Sentence*

Appellant Patterson argues that his sentence was unduly harsh and was not based upon an accurate presentence report. His sentence, however—a prison term of seven years, a fine of $10,000, and a special parole of five years—was well within the limits prescribed by 21 U.S.C. § 841(b)(1)(A), which specifies a maximum term of fifteen years, a fine of not more than $25,000, and a special parole term of at least three years. Appellant Patterson's argument in essence is that he was dealing only in mannite and not in heroin. But as we have recounted above, he was properly found to be a member of a heroin conspiracy; his sentence for that was not, as he contends, either cruel and unusual, or unduly harsh; and of course we cannot, on appeal, review sentences simply to see whether we would have reached the same result, *see Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974).

In connection with Patterson's presentence report, the judge struck any information as to Patterson's alleged heroin dealings which the Government conceded was inaccurate. The judge also stated that he would disregard certain other matters, called to his attention by defense counsel, which were allegedly misleading or irrelevant. Thus Patterson's claim that his sentence was based on an inaccurate report is without merit.

M. *Presence of DEA Special Agent at Government Counsel's Table*

Appellant Perry argues that the trial court improperly allowed the Government's DEA Special Agent Rice to remain at the counsel table, despite a request under Federal Rule of Evidence 615 that he be excluded from the courtroom. But a Government investigative agent falls within the exception in Rule 615(2) for "an officer or employee of a party which is not a natural person." The legislative history of Rule 615 makes it clear that a governmental investigative agent, even though he is also a witness, may be designated to sit at the Government counsel's table. *See* S. Rep. No. 1277, 93rd Cong., 2d Sess. 26 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7072-73.

Convictions of all appellants affirmed.

*Appendix A*

UNITED STATES v. LEROY PERRY, et al.
79-1407 February 9, 1981

VAN GRAAFEILAND, *Circuit Judge* (concurring):

I agree with Judge Nickerson that all of the judgments should be affirmed, and I believe it would be helpful to state briefly why I do.

It is hornbook law that one who aids and abets the commission of a crime is as responsible for the crime as if he committed it directly. *Nye & Nissen v. United States*, 336 U.S. 613, 618 (1949); *United States v. Molina*, 581 F.2d 56, 61 n.8 (2d Cir. 1978); *United States v. Campbell*, 426 F.2d 547, 553 (2d Cir. 1970); 18 U.S.C. § 2. Accordingly, a defendant who is indicted as a principal may be convicted on proof that he was merely an aider and abetter. *United States v. Bommarito*, 524 F.2d 140, 145 (2d Cir. 1975); *United States v. Ramsey*, 374 F.2d 192, 196 (2d Cir. 1967). So also, one who is charged with conspiracy to commit an unlawful act may be convicted if he conspired to aid and abet the commission of the act. *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *United States v. Valencia*, 492 F.2d 1071 (9th Cir. 1974); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

Appellants were charged with conspiring to violate 21 U.S.C. § 841(a)(1), which makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ." The jury quite properly could have found that appellants aided and abetted the manufacture and distribution of heoin by furnishing the essential diluents, mannite and quinine, and

thus were members of a drug conspiracy. *See United States v. Wolk*, 398 F. Supp. 405, 410 (E.D. Pa. 1975). Whether there was a single conspiracy or multiple conspiracies was for the jury under the instructions correctly given by the district judge. *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977).

## APPENDIX B — CORRECTION AND CHANGE SHEET

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. Daniel Fusaro
Clerk

U.S.A. v. Perry — September Term, 1979
Docket Nos. 79-1407, et al — Decided February 9, 1981

Page 6773, line 13 — delete "Butler heroin".

Page 6773, line 14 — delete "conspiracy that" and insert "Conspiracy charged that" in place thereof.

Page 6773, line 18 — delete "Butler in a" and insert "other decedants [sic] in the" in place thereof.

Page 6773, line 19 — delete "heroin conspiracy," and insert "conspiracy charged," in place thereof.

Page 6773, line 24 — delete "Butler conspiracy," and insert "conspiracy charged," in place thereof.

Page 6773, 2 bottom lines — delete entirely and insert "claim that severance was required. White [sic] the author would agree in respect to Dewees, but him only, my colleagues believe that" in place thereof.

Page 6774, line 1 — delete entirely and insert "none of the similar" in place thereof.

*Appendix B*

Page 6778, line 17 — delete entirely and insert "properly found to be a member of the conspiracy charged, in my colleagues' view, and of a heroin conspiracy, in the author's;" in place thereof.

A. DANIEL FUSARO,
Clerk

ADF/hjd

## APPENDIX C — ORDER DENYING REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of May, one thousand nine hundred and eighty-one.

No. 79-1407
79-1456
79-1458
79-1477
79-1486
79-1496

Filed May 13, 1981
A. Daniel Fusaro, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

DONALD DEWEES, JOEL MERLING, ARTHUR GIBBONS, HYMAN LIEBERMAN, LEROY PERRY, PETER ISRAEL POLLACK, LEROY BUTLER, CLIFFORD JOSEPH PARAH, W.E. PATTERSON, CHARLES CAMERON,

Defendants,

*Appendix C*

LEROY PERRY, ARTHUR GIBBONS, CHARLES CAMERON, DONALD DEWEES, WILLIE EARL PATTERSON, LEROY BUTLER,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Willie Earl Patterson, Leroy Butler, and Charles Cameron, Arthur Gibbons, Leroy Perry, Donald Dewees,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED, Judge James L. Oakes dissenting as to appellant Donald Dewees,

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro
A. Daniel Fusaro,
Clerk